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4 UNITED STATES DISTRICT COURT

5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 SUREN BABAYAN, et al.,

11 Defendants.

Case No. 2:15-cr-00291-JAD-PAL

**REPORT OF FINDINGS AND  
RECOMMENDATION**

(Mot. Dismiss – ECF No. 38)

12 Before the court is Defendant Suren Babayan’s (“Babayan”) Motion to Dismiss Pursuant  
13 to Fed. R. Crim. P. 12, Alternatively for Outrageous Governmental Conduct and Entrapment (ECF  
14 No. 38) which was referred for a Report of Findings of Recommendation pursuant to 28 U.S.C. §  
15 636(b)(1)(B) and LR IB1-4. The court has considered the Motions (ECF Nos. 38), Defendant  
16 Arsen Grigoryan’s (“Grigoryan”) Joinders (ECF Nos. 39, 43), the government’s Response (ECF  
17 No. 41), and Babayan’s Reply (ECF No. 42).

18 **BACKGROUND**

19 **I. The Superseding Indictment**

20 Babayan was initially charged in an Indictment (ECF No. 1) returned October 20, 2015,  
21 with two counts of trafficking in contraband cigarettes in violation of 18 U.S.C. §§ 2342(a), and  
22 thirteen counts of money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(ii). Co-  
23 Defendant Grigoryan was initially charged in the Indictment (ECF No. 1) with one count of  
24 trafficking in contraband cigarettes in violation of 18 U.S.C. §§ 2342(a). A Superseding  
25 Indictment (ECF No. 19) was returned December 1, 2015, charging Babayan with eight counts of  
26 trafficking in contraband cigarettes in violation of 18 U.S.C. §§ 2342(a), conspiracy to traffic in  
27 contraband cigarettes in violation 18 U.S.C. § 371, and thirteen counts of money laundering in  
28 violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(ii). Co-Defendant Grigoryan is charged in the

1 Superseding Indictment (ECF No. 19) with conspiracy to traffic in contraband cigarettes in  
2 violation 18 U.S.C. § 371.

3 **II. The Motion to Dismiss**

4 The Motion to Dismiss is brought pursuant to Fed. R. Crim. P. 12(b) and seeks dismissal  
5 of the superseding indictment on grounds it violates Babayan's due process rights under the Fifth  
6 Amendment. Alternatively, Babayan argues the court should dismiss the superseding indictment  
7 based on outrageous government conduct and entrapment. Babayan argues that the indictment  
8 alleges that from September 2014, to approximately October 2015, Babayan coordinated and  
9 purchased cigarettes from Crescent City, a New Orleans, Louisiana company, and thereafter  
10 distributed cigarettes in various locations including Montebello, California and countries outside  
11 of the United States. The superseding indictment alleges that he knowingly purchased, received,  
12 possessed, and sold in excess of 10,000 cigarettes which bore no evidence of payment of applicable  
13 Nevada state cigarette taxes. The superseding indictment charges Babayan with money laundering  
14 for engaging in financial transactions converting cash into money orders and making cash deposits  
15 into a J.P. Morgan Chase Bank account.

16 The motion maintains that the superseding indictment is fatally defective because it does  
17 not charge a viable conspiracy to commit a crime. The superseding indictment charges Babayan  
18 with participating in a conspiracy to avoid paying cigarette taxes. However, it fails to allege any  
19 facts that establish Babayan actually owed cigarette taxes on the sales. He contends he cannot be  
20 convicted for conspiring to avoid cigarette taxes that were never due by him or AG Export, LLC.  
21 Babayan argues that the Contraband Cigarette Trafficking Act ("CCTA") makes it unlawful for  
22 any person to knowingly ship, transport, receive, possess, sell, distribute, or possess contraband  
23 cigarettes. Contraband cigarettes are defined as a quantity in excess of 10,000 cigarettes which do  
24 not bear state-required stamps as evidence of payment of the required state cigarette tax.  
25 Therefore, prosecution of the CCTA requires proof of a violation of state law, because cigarettes  
26 are not contraband if no taxes are due.

27 Babayan also argues that only cigarettes sold to retailers in Nevada are subject to Nevada's  
28 cigarette tax under state law. The superseding indictment does not allege that Babayan sold any

1 cigarettes to retailers in Nevada during the time period at issue. Rather, it alleges Babayan  
2 participated in brokering the cigarettes exclusively to an international customer “which bore the  
3 responsibility for paying any applicable taxes in their country.” NRS 370.210 provides that no  
4 cigarette revenue stamp tax is required on cigarettes exported from Nevada. Therefore, Babayan  
5 had no liability to pay any Nevada taxes during the relevant time period. Because he had no legal  
6 obligation to place tax stamps on the cigarettes sold, he cannot be guilty of conspiracy to violate  
7 the CCTA.

8 In this case, Department of Homeland Security law enforcement officers established an  
9 “Undercover Company and Warehouse” to facilitate large-scale sales. Babayan attaches invoices  
10 from RJ Reynolds and Altria-Phillip Morris as exhibits to the motion to dismiss. These invoices  
11 establish that the cigarettes used in the sting operation were initially purchased by the Department  
12 of Homeland Security (“DHS”) agents from these companies. From September 20, 2014, through  
13 October 2015, law enforcement officers allegedly sold approximately 29,850 cartons of cigarettes  
14 through the defendants and AG Export LLC, for export, in return for over \$1 million. After DHS  
15 agents received them, agents arranged for the cartons to be shipped and transported to the  
16 undercover warehouse in Louisiana, where most of the cigarettes were stamped by DHS agents.  
17 The stamped cigarettes were then arranged to be shipped to Las Vegas or California by DHS agents  
18 and allegedly sold by undercover law enforcement officers “and brokered by Defendants to the  
19 ultimate buyer in Russia.” Under 18 U.S.C. § 2341(2) certain persons are exempted individuals  
20 or entities. Among exempted individuals are officers, employees, or agents of the United States.

21 Under these circumstances, Babayan maintains that the indictment should be dismissed  
22 because it was factually and legally impossible for him to commit the acts alleged in the  
23 indictment. He reasons that the term “contraband cigarettes” under the CCTA means a quantity  
24 in excess of 10,000 cigarettes which bear no evidence of the payment of applicable state or local  
25 taxes in the state or locality where such cigarettes are found. A violation of the CCTA requires,  
26 as a predicate, the failure to comply with state tax laws. The motion argues that the government’s  
27 tobacco diversion tactics in this investigation violate the plain language of the CCTA which was  
28

1 intended as a tool to assist states that have lost hundreds of millions of dollars in tax revenue for  
2 smuggling or bootlegging contraband cigarettes.

3 Here, the superseding indictment alleges that Babayan and co-defendant Grigoryan  
4 purchased over 10,000 contraband cigarettes from undercover DHS agents, who in turn purchased  
5 them from Phillip Morris and RJ Reynolds. As part of the sting operation, DHS agents purchased,  
6 shipped, transported, possessed, sold, and distributed the cigarettes to Babayan and Grigoryan. If  
7 the cigarettes DHS agents purchased were contraband cigarettes as defined by the CCTA, then  
8 DHS' actions in relation to this case violated the plain language of 18 U.S.C. § 2342(a). This is  
9 because § 2341(2)(D) only exempts government agents from *possessing* contraband cigarettes in  
10 the performance of their official duties. Section 2341(2)(D) has no exemption allowing "creation  
11 and orchestration" of a crime by purchasing, shipping, transporting, distributing, and selling  
12 contraband cigarettes.

13 Babayan acknowledges that there are a number of federal statutes which permit law  
14 enforcement officers to engage in unlawful criminal activity without sanctions. However, the  
15 CCTA has no provisions similar to those other statutes. In this case, DHS agents purportedly  
16 bought and sold millions of arguably taxable cigarettes in violation of the law they were tasked  
17 with enforcing. This is unlike a traditional reverse sting operation where law enforcement agents  
18 maintain custody and control of contraband. Here, the defendants received the cigarettes and  
19 allegedly exported them to other countries, and the DHS agents were therefore directly responsible  
20 for the introduction of millions of allegedly contraband cigarettes into the stream of commerce  
21 with no intention to track or recover them. Babayan maintains that there is simply no authority for  
22 the government to run this type of uncontrolled operation.

23 Babayan contends that it was factually and legally impossible for him to commit the acts  
24 alleged in the superseding indictment because if the cigarettes were not subject to state taxation,  
25 they were not contraband cigarettes under 18 U.S.C. § 2341. He cites the Fourth Circuit case of  
26 *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957) for the proposition there can be no  
27 conviction for conspiracy to commit an offense against the United States if the act that the alleged  
28

1 conspirators agreed to has not been made unlawful, and is not planned to be accomplished in an  
2 unlawful manner.

3 Babayan also argues the court should dismiss the indictment in this case because of the  
4 government's outrageous conduct. He seeks a hearing to determine whether law enforcement  
5 officers acted illegally in this case which would warrant dismissal of the superseding indictment  
6 with prejudice based on outrageous government conduct. The outrageous government conduct  
7 defense focuses solely on the government's actions. In this case, DHS agents bought and sold  
8 millions of cigarettes in violation of the law they were tasked for enforcing. The undercover  
9 operation allowed the defendants to keep the allegedly contraband cigarettes and resell or broker  
10 them by exporting them internationally. Thus, any deprivation of applicable tax revenue was  
11 solely due to the government's undercover conduct. DHS introduced millions of cigarettes into  
12 the stream of commerce in Nevada and California which contained allegedly counterfeit tax stamps  
13 placed on them by DHS agents or at their instruction. The agents' "unorthodox behavior escalated"  
14 in their efforts to push higher and higher quantities of cigarettes on the defendants. The motion  
15 maintains that beginning in August 2014, the defendants were unable to come up with sufficient  
16 advance funds to pay for all of the cigarettes, so DHS "fronted" the products to the defendants to  
17 maintain and increase the volume of cigarettes being distributed from the undercover company  
18 warehouse. At times, DHS also funded the entire operation. Government agents engineered and  
19 orchestrated the events giving rise to the criminal charges. The government's conduct in this  
20 undercover operation to cajole the defendants to engage in illegal sale of cigarettes domestically  
21 "shocks one's universal sense of justice."

22 The motion concludes by asserting that the defendants did everything by the book to  
23 establish and incorporate an export company with the Nevada Secretary of State. They obtained  
24 a Nevada state business license, a Clark County business license, and consulted with a state  
25 revenue officer in the Department of Taxation and Compliance to assure no impropriety or  
26 violation of any statute, ordinance, or regulation "insofar as receiving cigarettes which would be  
27 **exported** only by commercial airline carrier passenger(s)." (emphasis in original.) The defendants  
28 were advised that it was perfectly legal to do what they were doing as long as no retail sale of

1 cigarettes occurred in Nevada. Under the totality of the circumstances, the outrageous conduct  
 2 exhibited by DHS agents is egregious enough to shock the conscience and warrant dismissal of  
 3 the superseding indictment.

4 Finally, he argues the superseding indictment should be dismissed because law  
 5 enforcement created a crime for the purpose of bringing charges against the defendants who were  
 6 otherwise innocent by persuading them to participate in wrongdoing which amounts to entrapment.

7 Co-defendant Grigoryan filed a one-sentence joinder in the motion and reply.

### 8 III. The Government's Response

9 The government opposes the motion claiming that in July 2014, Babayan contacted a Las  
 10 Vegas smoke shop owner seeking an inexpensive source of cigarettes to smuggle to Russia. The  
 11 smoke shop owner gave Babayan the undercover phone number of Homeland Security Special  
 12 Agent Scott McGuire. Babayan allegedly contacted McGuire. McGuire informed Babayan that  
 13 McGuire ran a bonded warehouse in New Orleans that sold duty-free cigarettes to crews of  
 14 international ships that sailed through New Orleans. The government claims that over the next  
 15 several months in numerous recorded phone conversations, texts, and meetings, Babayan ordered  
 16 and received more than 5 million cigarettes from McGuire. The government maintains that all  
 17 cigarette purchases were initiated by Babayan and delivered to Babayan, and co-defendant  
 18 Grigoryan, always in Nevada. Babayan bragged about having been in the business of smuggling  
 19 cigarettes for over 10 years, and discussed the fact that applicable state taxes had not been paid on  
 20 cigarettes obtained by Babayan and Grigoryan.

21 The government argues that Fed. R. Crim. P. 12(b)(3)(v) allows defendants to bring a  
 22 pretrial motion seeking dismissal of an indictment if it fails to state an offense as long as the motion  
 23 can be determined without a trial on the merits. However, the court must accept all facts alleged  
 24 in the indictment as true. The government argues that all counts in the superseding indictment  
 25 sufficiently allege criminal offenses. The defendants are charged in each count with conduct  
 26 involving "contraband cigarettes" and whether the cigarettes were contraband is an element of the  
 27 charged offenses and a matter of fact for the jury to determine.

1       The government also asserts that defendants incorrectly characterize the superseding  
 2 indictment as charging them with participating in a conspiracy to avoid paying cigarette taxes.  
 3 The government argues that while payment of applicable state taxes may or may not be relevant  
 4 to proving a charge against the defendants, they are charged with conspiracy to traffic in  
 5 contraband cigarettes. Citing *United States v. Skoczen*, 405 F.3d 437, 457 (7th Cir. 2005), the  
 6 government argues that the defendants are liable for possessing contraband cigarettes even though  
 7 they may not be the ones who owe any applicable taxes. The government maintains that  
 8 defendant's motion is ultimately based on arguments that Nevada taxes were not owed.  
 9 Acknowledging that the defendant's claim may be a defense to the charges, the government argues  
 10 that defense is based on a number of facts which are matters to be determined by the jury and  
 11 outside the scope of a Rule 12(b) motion. The motion, in effect, is challenging the sufficiency of  
 12 the government's evidence, or ability to prove its case rather than the sufficiency of the indictment.

13       With respect to the defendant's outrageous government misconduct arguments, the  
 14 government disputes that agents engaged in illegal conduct. Contraband cigarettes are defined in  
 15 18 U.S.C. § 2341(2)(D) which does not apply to officers, employees, or agents of the United States  
 16 who have possession of cigarettes in connection with the performance of their official duties. The  
 17 government also cites *United States v. Hasan*, 718 F.3d 338, 334 (4th Cir. 2014) in support of its  
 18 arguments that untaxed cigarettes are not contraband in the possession of federal agents.  
 19 Therefore, subsequent distribution of cigarettes through undercover sales to cigarette traffickers is  
 20 not distribution of contraband cigarettes by the agents. Under the holding in *Hasan*, untaxed  
 21 cigarettes only become contraband when they are possessed by someone like the defendants who  
 22 are not exempted from the statutory definition of contraband cigarettes.

23       Citing *United States v. Recio*, 270 F.3d 845, 848 (9th Cir. 2001) and *United States v.*  
 24 *Fiander*, 547 F.3d 1036, 1042 (9th Cir. 2008), the government argues that the Ninth Circuit has  
 25 held that neither legal, nor factual impossibility is a defense to a charge of conspiracy.

26       Finally, the government maintains that Babayan's list of improper tactics employed by  
 27 agents in this undercover operation did not singularly, or in combination, "elevate this  
 28 investigation to the level of outrageous conduct." The United States relies on *United States v.*

1        *Khan*, 771 F.3d 367, 377 (7th Cir. 2014) and *Hasan, supra*, to argue that this investigation is  
 2 similar to other contraband cigarette investigations and prosecutions in which some of the same  
 3 arguments have been raised and rejected. There is nothing about the nature of this investigation  
 4 that would rise to the level of outrageous conduct, and the court should therefore deny the motion  
 5 to dismiss.

6        **IV. The Reply**

7              The reply argues the government has failed to provide any authority establishing that any  
 8 taxes were applicable for cigarettes that were shipped out of the country. The Seventh Circuit case  
 9 of *United States v. Skoczen*, has no bearing on this issue. In fact, Babayan argues the case strongly  
 10 supports his position because it expressly recognizes that if the defendant had been a distributor  
 11 planning to ship cigarettes out of state, he would not have had to affix tax stamps and would not  
 12 be in violation of the CCTA. Thus, the indictment must be dismissed as a matter of law because  
 13 the government has not and cannot establish that cigarettes were contraband under Nevada law,  
 14 and therefore cannot establish a violation of the CCTA.

15              The reply also argues that the government's opposition did not establish that the indictment  
 16 is adequate as a matter of law because the CCTA only criminalizes actions involving contraband  
 17 cigarettes. Babayan cannot be guilty of a CCTA violation unless taxes were owed on the cigarettes.  
 18 The CCTA only prohibits possession of unstamped cigarettes if taxes are due. This is a critical  
 19 point that the government continues to ignore.

20              Finally, Babayan argues that the government has failed to cite a single case that holds that  
 21 cigarettes going out of the country must bear evidence of Nevada tax stamps. If the court believes  
 22 the Nevada regulatory scheme is "less than clear", the rule of lenity should "serve as a tie breaker  
 23 in his favor." Under the rule of lenity, a court is required to limit the reach of criminal statutes to  
 24 the clear import of their text and construe any ambiguity against the government. The court should  
 25 therefore dismiss the superseding indictment with prejudice.

26              ///

27              ///

28              ///

## **DISCUSSION**

## I. Applicable Law

## A. Evidentiary Hearing

In *United States v. Howell*, the Ninth Circuit held a court must hold evidentiary hearing if the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the court to conclude that relief must be granted if the facts alleged are proved. See 231 F.3d 615, 620 (9th Cir. 2000) (citing *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986); *United States v. Irwin*, 613 F.2d 1182, 1187 (9th Cir. 1980); *United States v. Carrion*, 463 F.2d 704, 706 (9th Cir. 1972). The court need not hold a hearing on defendant's pre-trial motion "merely because a defendant wants one. Rather, the defendant must demonstrate that a significant disputed factual issue exists such that a hearing is required." *Howell*, 231 F.3d at 621 (internal citation omitted). The determination of whether an evidentiary hearing is appropriate rests in the reasoned discretion of the district court. *United States v. Santora*, 600 F.2d 1317, 1320 (9th Cir.), amended by 609 F.2d 433 (1979). The court finds Babayan has not met his burden of establishing he would be entitled to the relief requested, that is, dismissal, if the facts he alleges in the motion to dismiss for outrageous government conduct were proved. The court will therefore deny his request for an evidentiary hearing.

B. Fed. R. Crim. P. 12

Pursuant to Rule 12 of the Federal Rule of Criminal Procedure, a “party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” Fed. R. Crim. P. 12(b)(1). Rule 12(b)(3) specifies the motions which must be made before trial. Fed. R. Crim. P. 12(b)(3). Among these is a motion to dismiss for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(v). A pretrial motion to dismiss a criminal case is appropriate when it involves questions of law rather than fact. *United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir. 1987).

In ruling on a pretrial motion to dismiss, “the district court is bound by the four corners of the indictment.” *United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014); *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002) (“On a motion to dismiss an indictment for failure to state an

1 offense the court must accept the truth of the allegations in the indictment in analyzing whether a  
 2 cognizable offense has been charged.”). The court should not consider evidence that does not  
 3 appear on the face of the indictment. *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996).  
 4 Thus, a defendant is not entitled to an evidentiary hearing to obtain a preview of the government’s  
 5 evidence and an opportunity to cross-examine its witnesses. *Id.* at 669 (“A motion to dismiss the  
 6 indictment cannot be used as a device for a summary trial of the evidence.”).

7 In determining whether a cognizable offense has been charged, the court does not consider  
 8 whether the government can *prove* its case, only whether accepting the facts as alleged in the  
 9 indictment as true, a crime has been alleged. *United States v. Milovanovic*, 678 F.3d 713, 717 (9th  
 10 Cir. 2012). Rule 12 motions cannot be used to determine “general issues of guilt or innocence”  
 11 which “helps ensure that the respective provinces of the judge and jury are respected.” *Boren*, 278  
 12 F.3d at 914 (citation omitted). A defendant may not challenge a facially-sufficient indictment on  
 13 the ground that the allegations are not supported by adequate evidence. *Jensen*, 93 F.3d at 669  
 14 (citation omitted). However, the court may dismiss an indictment if “it fails to recite an essential  
 15 element of the charged offense.” *United States v. Ezeta*, 752 F.3d 1182, 1184 (9th Cir. 2014)  
 16 (citing *United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005)).

17 **C. Sufficiency of an Indictment**

18 An indictment is “sufficient if: (1) it contains the elements of the offense charged and fairly  
 19 informs the defendant of the charge against which he must defend; and (2) it enables him to plead  
 20 an acquittal or conviction in bar of future prosecutions for the same offense.” *United States v. Hill*,  
 21 279 F.3d 731, 741 (9th Cir. 2002) (citing *Hamling v. United States*, 418 U.S. 87 (1974)); *see also*  
 22 *Russell v. United States*, 369 U.S. 749, 763–64 (1962); Fed. R. Crim. P. 7(c).

23 An indictment is generally sufficient if it sets forth the offense in the words of the statute  
 24 itself as long as “those words of themselves fully, directly, and expressly, without any uncertainty  
 25 or ambiguity, set forth all of the elements necessary to constitute the offenses intended to be  
 26 punished.” *Hamling*, 418 U.S. at 117. The Ninth Circuit has held:

27 An indictment will withstand a motion to dismiss “if it contains the  
 28 elements of the charged offense in sufficient detail (1) to enable the  
 defendant to prepare his defense; (2) to ensure him that he is being

prosecuted on the basis of the facts presented to the grand jury; (3) to enable him to plead double jeopardy; and (4) to inform the court of the alleged facts so that it can determine the sufficiency of the charge.”

3        *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994) (quoting *United States v. Bernhardt*, 840  
4 F.2d 1441, 1445 (9th Cir. 1988)); *see also United States v. Musacchio*, 968 F.2d 782, 787 (9th Cir.  
5 1991)); *United States v. Flanagan*, 126 F. Supp. 2d 1284, 1292–93 (C.D. Cal. 2000); *Ruiz-Castro*,  
6 125 F. Supp. 2d at 413. The sufficiency of an indictment is determined by “whether the indictment  
7 adequately alleges the elements of the offense and fairly informs the defendant of the charge, not  
8 whether the government can prove its case.” *United States v. Blinder*, 10 F.3d 1468, 1471 (9th  
9 Cir. 1993) (quoting *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982), *cert. denied*, 460  
10 U.S. 1086 (1983)).

11        The Ninth Circuit reviews a district court's decision to dismiss an indictment *de novo*.  
12        *United States v. Jackson*, 480 F.3d 1014, 1016 (9th Cir. 2007).

13        Here, Babayan and Grigoryan are charged in Count 1 with conspiracy to traffic in  
14 contraband cigarettes. The superseding indictment alleges that between September 2014, and  
15 October 2015, the defendants conspired “to knowingly and unlawfully ship, transport, receive,  
16 possess, and purchase contraband cigarettes in violation of 18 U.S.C. § 2342(a). Superseding  
17 Indictment (ECF No. 19), Count 1. The primary purpose of the conspiracy was to make as much  
18 money as possible which was carried out in the ways, manner and means described in Paragraphs  
19 1 through 8 of the superseding indictment. The superseding indictment outlines 47 overt acts  
20 committed in furtherance of the conspiracy in the District of Nevada and elsewhere.

Counts 2 through 9 allege Babayan trafficked in contraband cigarettes on 7 different occasions between October 23, 2014, and May 27, 2015, in that he “did knowingly and unlawfully ship, transport, receive, possess, and purchase contraband cigarettes, as that term is defined in 18 U.S.C. § 2341, to wit: a quantity of more than 10,000 cigarettes which bore no evidence of payment of applicable State cigarette taxes in the State of Nevada, in violation of 18 U.S.C. § 2342(a).”

Counts 10 through 13 allege Babayan engaged in money laundering transactions between November 16, 2014, and November 19, 2014, in the State of Nevada in that he “did knowingly conduct financial transactions affecting interstate commerce” by purchasing MoneyGram money

1 orders in amounts of \$1000 or less knowing that the transactions were the proceeds of some form  
 2 of unlawful activity to promote trafficking in contraband cigarettes and knowing the transactions  
 3 were designed to avoid a reporting requirement under federal law. Counts 14 through 22 allege  
 4 Babayan engaged in money laundering in that he “did knowingly conduct financial transactions  
 5 affecting interstate commerce” by making cash deposits into a J.P. Morgan Chase Bank account  
 6 between February 17, 2015, and March 10, 2015, involving the proceeds of trafficking in  
 7 contraband cigarettes in violation of 18 U.S.C. § 2342(a): “(1) with the intent to promote the  
 8 carrying on of a specified unlawful activity, to-wit: trafficking in contraband cigarettes; and (2)  
 9 knowing that the transactions were designed in whole or in part to avoid a reporting requirement  
 10 under Federal law.”

11 Babayan is charged under the CCTA with conspiracy to traffic in contraband cigarettes,  
 12 and trafficking in contraband cigarettes. The CCTA makes it “unlawful for any person knowingly  
 13 to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes, or contraband  
 14 smokeless tobacco.” 18 U.S.C. § 2342(a). The CCTA defines contraband cigarettes as:

15 ....a quantity in excess of 10,000 cigarettes, which bear no evidence  
 16 of the payment of applicable State or local cigarette taxes in the State  
 17 or locality where such cigarettes are found if the State or local  
 18 government requires a stamp, impression, or other indication to be  
 19 placed on packages or other containers of cigarettes to evidence  
 payment of cigarette taxes, and which are in the possession of any  
 person other than a person otherwise authorized to possess such  
 cigarettes.

20 18 U.S.C. § 2342(2). Four elements exist for a CCTA violation: that a defendant (1) knowingly  
 21 ship, transport, receive, possess, sell, distribute, or purchase (2) more than 10,000 cigarettes (3)  
 22 that do not bear tax stamps, (4) under circumstances where state or local cigarette tax law requires  
 23 the cigarettes to bear such stamps. 18 U.S.C. §§ 2341(2), 2342(a). *City of New York v. Fedex*  
*Ground Package System, Inc.*, 314 F.R.D. 348 (S.D.N.Y. 2016).

25 Babayan is charged with conspiracy to violate the CCTA and trafficking in cigarettes in  
 26 violation of the CCTA. With respect to the conspiracy count, the government is correct that the  
 27 Ninth Circuit has held legal and factual impossibility are not defenses to a conspiracy charge.  
 28 *United States v. Fiander*, 547 F.3d 1036, 1042 (9th Cir. 2008). There, the court held that although

1 the defendant could not be prosecuted for a substantive violation of the CCTA because he was a  
 2 member of the Yakima Nation, he could be prosecuted for a RICO conspiracy in which the  
 3 racketeering activity was contraband cigarette trafficking. The Ninth Circuit found this  
 4 conclusion was consistent with “well-established conspiracy law.” *Id.* Conspiracy punishes  
 5 concerted criminal activity and a defendant may be convicted of a conspiracy whether or not the  
 6 subsequent crime is committed. *Id.* Many conspiracies arise out of federal law enforcement sting  
 7 operations. The Ninth Circuit has long held that impossibility is not a defense to a conspiracy  
 8 charge. *Id.*, citing *United States v. Bosch*, 914 F.2d 1239, 1241 (9th Cir. 1990) (rejecting the  
 9 defendant’s argument that because the undercover agent never actually possessed cocaine, it was  
 10 “legally impossible...to conspire to aid and abet a non-existent offense”); *United States v. Everett*,  
 11 292 F.2d 596,599 (9th Cir. 1982) (rejecting the defense of legal impossibility to a conspiracy  
 12 charge where the conspiracy was with an undercover agent). See also *United States v. Rueter*, 536  
 13 F.2d 296, 298 (9th Cir. 1976) (rejecting impossibility defense in a conspiracy charge, holding that  
 14 “accomplishment of the conspiracy’s goal is immaterial to the crime”).

15 In reviewing the sufficiency of the indictment, the court does not determine whether the  
 16 government can prove its case, only whether the indictment states a cognizable offense. Here, the  
 17 indictment alleges a conspiracy to traffic in contraband cigarettes which tracks the statutory  
 18 language.

19 The trafficking in contraband cigarette counts also track the statutory language and allege a  
 20 violation of the CCTA in that Babayan “did knowingly and unlawfully ship, transport, receive,  
 21 possess, and purchase contraband cigarettes, as that term is defined in 18 U.S.C. § 2341, to-wit: “a  
 22 quantity of more than 10,000 cigarettes which bore no evidence of the payment of applicable State  
 23 cigarette taxes in the State of Nevada.” The government acknowledges that whether or not  
 24 Babayan owed Nevada cigarette taxes may be a defense to the charges. However, the government  
 25 argues that this defense is based on factual arguments which must be determined by the jury, and  
 26 not the court in a Rule 12(b) motion.

27 At least one circuit has held that a defendant could be convicted of violating the CCTA  
 28 without being one required to pay state cigarette taxes. In *United States v. Skoczen*, 405 F.3d 537

(7th Cir. 2005), the Seventh Circuit Court of Appeals held that the fact that the defendant did not violate the Illinois state cigarette tax law because he was not a distributor, and therefore not responsible under state law for paying cigarette taxes, did not preclude his conviction under the CCTA. The court reasoned that the CCTA makes it a crime to knowingly possess contraband cigarettes which are defined as cigarettes that bear no evidence of payment of applicable state taxes in the state where the cigarettes are found. The Seventh Circuit held that the CCTA did not require that the person possessing contraband cigarettes be the one in violation of state law. It found that although a violation of state cigarette tax law may be a predicate to a CCTA violation, this did not mean that the defendant violating the federal act must also be in violation of the state law. The court concluded that the CCTA applies not only to a person to whom state law requires payment of taxes, but to anyone who possesses more than the requisite quantity of cigarettes which bear no evidence of payment of applicable state cigarette taxes.

The superseding indictment is not required to negate an affirmative defense, or the exceptions under the CCTA. *United States v. Gord*, 77 F.3d 1192, 1194 (9th Cir. 1996). There the court held that a violation of the state cigarette tax law is a predicate to a CCTA violation. *Id.* at 1193. However, citing a number of its prior cases, it held that while the indictment must ordinarily charge every essential element of the offense, it need not negate every applicable statutory exception. *Id.* (internal quotations and citations omitted).

Babayan's arguments regarding whether he owed any state cigarette taxes, and whether state cigarette taxes were actually due, are fact based determinations for the jury to decide based on the evidence introduced at trial, and not for the court to determine in a motion to dismiss. The indictment in this case alleges that Babayan knowingly and unlawfully shipped, transported, received, possessed and distributed contraband cigarettes which did not bear evidence of payments of applicable state cigarette taxes in the state of Nevada. It tracks the language of the CCTA and alleges all elements of the offense. It is thus sufficient to inform Babayan of the nature of the charges, enable him to prepare his defense, and plead double jeopardy.

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1           **II.      Outrageous Government Conduct**

2           Babayan also seeks dismissal of the superseding indictment based on outrageous  
 3 government conduct. An outrageous government conduct defense is grounded in due process  
 4 principles. A dismissal of an indictment for outrageous government conduct is rooted in the due  
 5 process clause of the Fifth Amendment of the Constitution which provides, “no person shall . . .  
 6 be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. V. In  
 7 *United States v. Russell*, 411 U.S. 423, 431-32 (1973), the Supreme Court held that outrageous  
 8 government conduct occurs when the actions of law enforcement officers or informants are “so  
 9 outrageous that due process principles would absolutely bar the government from invoking judicial  
 10 processes to obtain a conviction.”

11           The Ninth Circuit has held that dismissal of an indictment for outrageous government  
 12 conduct is “limited to extreme cases” in which the defendant can demonstrate that the  
 13 government’s conduct “violates fundamental fairness” and is “so grossly shocking and so  
 14 outrageous as to violate the universal sense of justice.” *United States v. Stinson*, 647 F.3d 1196,  
 15 1209 (9th Cir. 2011). This is an “extremely high standard.” *United States v. Black*, 733 F.3d 294,  
 16 302, (citing *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993)). There are only two  
 17 federal appellate court decisions which have reversed convictions for outrageous government  
 18 conduct. *Black*, *Id.* citing *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978); *Greene v. United*  
 19 *States*, 454 F.2d 783 (9th Cir. 1971).

20           Because there is no bright line rule establishing when law enforcement’s conduct goes from  
 21 acceptable to outrageous, each case must be resolved on its own facts, considering the totality of  
 22 the circumstances. *Id.* at 302, 304. The Ninth Circuit’s decisions prior to *Black* provided some  
 23 guidance about when law enforcement conduct crosses the line between acceptable and  
 24 outrageous. In *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008), the Ninth Circuit  
 25 held that it was outrageous for government agents to engineer and direct a criminal enterprise from  
 26 start to finish (internal quotations omitted). It is outrageous government conduct to use “excessive  
 27 physical or mental coercion” to convince an individual to commit a crime. *United States v.*  
 28 *McClelland*, 72 F.3d 717, 721 (9th Cir. 1995). It is outrageous for the government to generate new

1 crimes “merely for the sake of pressing criminal charges.” *United States v. Emmert*, 829 F.2d 805,  
 2 812 (9th Cir. 1987). It is not outrageous for law enforcement to infiltrate a criminal organization,  
 3 approach people who are already involved in or contemplating a criminal act, or to provide  
 4 necessary items to a conspiracy. *United States v. So*, 755 F.2d 1350, 1353 (9th Cir. 1985). It is  
 5 also not outrageous for the government to “use artifice and stratagem to ferret out criminal  
 6 activity.” *United States v. Bogart*, 729 F.2d 1428, 1438.

7 In *United States v. Black*, the Ninth Circuit found that the reverse sting challenged on  
 8 appeal fell “within the bounds of law enforcement tactics that have been held reasonable.” 733  
 9 F.3d at 302.<sup>1</sup> Although the court upheld the conviction, it was troubled by two aspects of the  
 10 fictional sting operation and how it came about in the first place. First, the court of appeals was  
 11 concerned that the defendants were convicted of conspiracy to possess cocaine with intent to  
 12 distribute and use of firearms in furtherance of a drug trafficking crime which resulted from an  
 13 operation created and staged by ATF. *Id.* at 302-303. An ATF undercover officer used a CI and  
 14 invented the entire scenario, the need for weapons and a “crew,” and the amount of cocaine  
 15 involved. The court found that the facts of the case suggested that the defendants were responding  
 16 to the government’s script, and that their only overt actions involved showing up at meetings,  
 17 arriving at a parking lot with four hidden, loaded weapons, and driving to the storage warehouse  
 18 where they were arrested. The defendants’ actions corroborated that they intended to carry out  
 19 these robberies, but also that they were responding to the scheme created by the government. The  
 20 *Black* court’s second concern with the reverse sting operation was how the government recruited  
 21 the defendants. ATF did not infiltrate a suspected crew of home invasion robbers or seduce  
 22 persons known to have actually engaged in these types of crimes.

23 In upholding the convictions the Ninth Circuit applied various factors its prior cases had  
 24 found relevant to determine whether the government conduct was outrageous: (1) known criminal  
 25 characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the  
 26 government’s role in creating the crime of conviction; (4) the government’s encouragement of the

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 28 <sup>1</sup> A “reverse sting” is a term applied when the government initiates the criminal conduct, setting up a fictitious crime,  
     and arresting criminals as they begin to carry out what they believe is a real crime. *Id.* at 298 n.1.

1 defendants to commit the offense conduct; (5) the nature of the government's participation in the  
2 offense conduct; and (6) the nature of the crime being pursued and the necessity for the actions  
3 taken in light of the nature of the criminal enterprise at issue. *See* 733 F.3d at 303. However, the  
4 Ninth Circuit stated that these factors were not a "formulistic checklist," but a means to focus the  
5 court's "analysis of the totality of the circumstances." *Id.* at 304.

6 Applying these factors, the court finds that Babayan has not established that the  
7 government conduct he challenges is one of the extreme cases that violates fundamental fairness  
8 and is so grossly shocking and outrageous as to violate a universal sense of justice. This is an  
9 extremely high standard, and there are only two federal appellate court decisions which have  
10 reversed convictions for outrageous government conduct. Babayan claims that the government's  
11 undercover sting operation in this case amounts to outrageous government conduct which warrants  
12 dismissal for a variety of reasons. First, he argues that undercover agents bought and sold  
13 contraband cigarettes in violation of federal law, and allowed the defendants to keep the  
14 contraband cigarettes to resell or broker. Thus, it was the government that was depriving the state  
15 of state tax revenues. Second, the government introduced millions of cigarettes with counterfeit  
16 tax stamps into interstate commerce. Third, government undercover officers "fronted" products  
17 to the defendants, sometimes funded the entire operation, and induced them to sell larger and larger  
18 quantities of contraband cigarettes. Finally, Babayan argues that government agents "cajoled" the  
19 defendants to engage in illegal sales. The motion does not specify how they were cajoled.

20 The government responds that the undercover investigation in this case was initiated after  
21 Babayan approached a smoke shop operator seeking an inexpensive source of cigarettes to  
22 smuggle to Russia. The smoke shop owner gave Babayan the undercover phone number of  
23 Homeland Security Special Agent Scott McGuire. The government claims, and Babayan's reply  
24 does not dispute, that Babayan contacted the undercover officer and over the next several months  
25 initiated purchases of more than 5,000,000 cigarettes from McGuire. The government maintains,  
26 and again Babayan does not dispute, that all cigarette purchases were initiated by Babayan and  
27 delivered to Babayan and co-defendant Grigoryan in Nevada. The government contends Babayan  
28 was caught in recorded conversations bragging about being in the business of smuggling cigarettes

1 for over 10 years and discussing the fact that applicable state taxes had not been paid on cigarettes  
 2 he and Grigoryan obtained.

3 In *United States v. Hasan*, 718 F.3d 338, 341 (4th Cir. 2013) the Fourth Circuit rejected  
 4 similar arguments that the ATF undercover operation was outrageous because ATF “let the  
 5 cigarettes walk” and allowed these items to be distributed on the black market rather than  
 6 confiscating them. The Fourth Circuit also rejected Babayan’s arguments that the government’s  
 7 conduct was outrageous because ATF agents could lawfully possess untaxed cigarettes under the  
 8 CCTA, but had no authority to distribute untaxed cigarettes. *Id.* at 344. The court found that this  
 9 was a misreading of the CCTA which did not “authorize” federal agents to possess contraband  
 10 cigarettes, but plainly provided that cigarettes in the possession of federal agents in the course of  
 11 their official duties were not contraband as a matter of law. *Id.* The court reasoned that untaxed  
 12 cigarettes only become contraband when they are possessed by people like the defendant, who is  
 13 not exempted from the statutory definition. *Id.*

14 In short, the court finds Babayan has not met the extremely high standard of establishing  
 15 the government conduct in this case is so outrageous it warrants dismissal.

### 16 III. Entrapment

17 Finally, Babayan argues the court should dismiss the indictment because the government’s  
 18 conduct in this undercover operation amounted to entrapment. “To establish entrapment as a  
 19 matter of law, the defendant must point to undisputed evidence making it patently clear that an  
 20 otherwise innocent person was induced to commit the illegal act by trickery, persuasion, or fraud  
 21 of a government agent.” *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986); See also  
 22 *United States v. Williams*, 547 F.3d 1187, 1197 (9th Cir. 2008). Entrapment is an affirmative  
 23 defense, therefore, it is “an issue for the trial, not for a motion to dismiss.” *United States v. Freed*,  
 24 401 U.S. 601, 607 (1971); see also *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003).  
 25 “Federal Rule of Criminal Procedure 12 allows a defendant to assert a defense in a pretrial motion  
 26 if the merits of the defense can be determined ‘without a trial of the general issue.’” *United States*  
 27 *v. Schafer*, 625 F.3d 629, 635 (9th Cir. 2010) (quoting Fed. R. Crim. P. 12(b)(2)). “However, if  
 28 the pretrial motion raises factual questions associated with the validity of the defense, the district

1 court cannot make those determinations" because doing so "would invade the province of the  
2 ultimate finder of fact." *Id.* (citing *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448,  
3 1452 (9th Cir. 1986); *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976)). Thus, even if a  
4 motion to dismiss is construed as a request for a jury instruction on the issue of entrapment, it is a  
5 matter that must be deferred until after the trial court hears the evidence and determines whether  
6 the parties have met their respective evidentiary burdens. *Schafer*, 625 F.3d at 635. Babayan's  
7 entrapment defense is a matter for the jury to decide based on the evidence presented at trial.

8 For the reasons explained,

9 **IT IS RECOMMENDED** that Babayan's Motion to Dismiss Pursuant to Fed. R. Crim. P.  
10 12, Alternatively, for Outrageous Governmental Conduct and Entrapment (ECF No. 38) be  
11 **DENIED.**

12 DATED this 8th day of December, 2016.

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14 PEGGY A. LEEN  
15 UNITED STATES MAGISTRATE JUDGE  
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